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Supreme Court of the United States

October Term, 1948.

No. 487.

DOUGLAS CHANDLER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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Now comes the above-named petitioner, Douglas Chandler, and presents this his petition for a rehearing of the above-entitled cause, and, in support thereof respectfully shows:

The Court on February 28, 1949, denied a petition for a writ of certiorari to review a decision of the United States Court of Appeals for the First Circuit affirming a judgment of the United States District Court for the District of Massachusetts that petitioner was guilty of treason. The sentence was that petitioner be imprisoned for the term of his natural life and pay a fine of Ten Thousand Dollars. Petitioner is now serving his sentence.

The case raised a number of important questions, never decided by this Court. The fundamental questions were these:

1. Whether treason may be committed by making speeches in opposition to a war in which the United States is engaged.

2. If so, whether the defendant may show and the jury may consider that he spoke from patriotic motives in a sincere belief that opposition to the war was in the best interests of the United States.

The discussion of these questions in the brief in support of the petition for certiorari was, as we thought required by the rules, limited to enough to show the Court the doubts inherent in them. It was further limited by the fact that they were not the sole issues presented. That discussion may well be regarded as superficial. We shall not here repeat what was said in that brief, nor attempt to reargue the matter at length, but shall add only this:

The only authority cited by the Government in support of the proposition that "broadcasting propaganda on behalf of an enemy is a treasonable act" is *Joyce v. Director of Public Prosecutions*, (1946) A. C. 347.

That case differs both in its facts and the law applicable from this. The Treason Act, 1945, had been passed, shortly before the trial, to remove the requirement of proof of an overt act by two witnesses. There was testimony by one witness as to a broadcast in September or October, 1939, to the effect that:

> "The prisoner's voice stated that Dover and Folkstone had been destroyed and this remained firmly in

my memory on account of the fact that there had been no enemy activity on Folkstone up to that date."

Trial of William Joyce, (Notable British Trials) ed. by J. W. Hall, p. 65.

The jury might have found, therefore, that Joyce had broadcast information known to be false.

But, more significantly, as the Government brief in opposition (p. 26) points out:

"Counsel for Joyce did not even venture to argue, either at the trial, or in the Court of Criminal Appeal, or in the House of Lords, that broadcasting for the enemy did not amount to treason."

There was no challenge to the sufficiency of the indictment. In argument to the jury, counsel for Joyce appointed by the Court, went so far as to say (*Ibid,* p. 206):

"I will assume against myself that in the years 1941, 1942, 1943, and 1944 he was adhering to the King's enemies."

The conviction of Joyce and its affirmance by the Court of Criminal Appeal and the House of Lords involved no decision of the question whether broadcasting propaganda is treason. That question was never raised by counsel for Joyce and was not noticed by any Court. Moreover, the conviction has not met with general approval. Mr. J. W. Hall, the editor of the report cited above, said in his Introduction (p. 35):

"* * * I have found, with a universal reprobation of Joyce's conduct, an almost equally universal feeling, shared by lawyers and laymen, servicemen and civilians, that (with the utmost respect to the eight out of nine learned judges) the decision was all wrong, and that an unmeritorious case has made bad law."

See also: Rebecca West: *The Meaning of Treason,* pp. 55-65.

The question here arises, we need hardly remind the Court, not under the Act of 25 Edward 3 as amended by the Treason Act, 1945, but under the Constitution, Art. III, Section 3, which by the use of the word "only" and the requirement of proof of an "overt act" had attempted to restrict the definition of treason.

The framers of the Constitution were familiar with Montesquieu's *Spirit of the Laws,* and were greatly influenced by it. They must have read in Book XII, c. 12, "Of indiscreet speeches":

> "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently so little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are.
>
> "Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification; for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence than by any expression whatever. Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow."

They must have known the words of John Milton in his *Areopagitica:*

> "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

They were of the same generation and shared the political ideas of Lord Erskine, who said in his speech in defense of Thomas Paine (1 Erskine's Speeches, 523):

"Had he a right to promulgate these opinions? If he entertained them, I shall argue that he had."

Thomas Paine, who had published his "Rights of Man" in England while remaining in France, might have been called a propagandist in 1792, if that word had then had its present meaning.

Sir Matthew Hale in his *Pleas of the Crown* had written (p. 114):

"By all which it seems, that regularly, 1. words of themselves cannot make high treason; words of themselves are not a sufficient overt-act within the statute of 25 E. 3 to serve as an indictment of compassing the King's death.

"And with this agrees that notable case of Mr. Pyne in Croke's reports, T. 4 (Car. (r) the words of which are these: 'Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his majesty, that the speaking of the words there mentioned, though they were as wicked as might be, were not treason; for they resolved, that, unless it were by some particular statute, no words will be treason; for there is no treason at this day, (viz. 4 Car. 1) but by the statute of 25 E. 3 for imagining the death of the King, and the indictment must be framed upon one of the points in that statute; and the words spoken there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.' "

Our own Courts have held that the "dissemination of ideas", no matter what their nature, does not constitute treason.

United States v. Werner, 247 Fed. 708, 710.

In that case the defendants were indicted for treason, and filed a demurrer. The Court explained the grounds for demurrer, as follows:

"Even if the indictment be read as charging as the overt act the publication of a newspaper containing certain utterances, it nevertheless means only giving expression to the quoted sentiments, and, however disloyal and traitorous the sentiments may be, the utterance of them does not constitute the crime of treason."

The Court quoted from the charge to the Grand Jury, reported in 5 Blatch. 550, Fed. Cas. No. 18271:

"Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime."

The Court declined to construe the indictment on demurrer as read by the defendants, but said:

"It is, of course, clear that if the law of treason be as thus stated, and, for the purpose of presenting the point upon which this demurrer is ruled we will assume it is, and if, at the close of the case, the United States has proven against the defendants only the utterance of treasonable sentiments, the law of the case must be so pronounced."

The 1918 Report of the Attorney General, at page 42, states the further proceedings:

"The court, however, at the end of the Government's testimony, dismissed the case on the ground that articles of this nature, which do not convey information to the enemy, but are an attack upon the war, cannot constitute the crime of treason. This decision made it clear that the treason statute could not be used against propaganda, however disloyal or dangerous, except in the rare cases where there is available proof that the propagandist is an agent of the enemy. The defendants were thereupon indicted and later tried and convicted under the espionage act."

The exception suggested by the Attorney General has no support in history or logic. If words cannot be overt acts under the treason statute, the fact that the words are spoken by an agent of the enemy will not make them acts.

Upon appeal in the proceedings under the Espionage Act, the convictions were affirmed in *Schaefer v. United States,* 251 U. S. 466. In a dissenting opinion in which Mr. Justice Holmes joined, Mr. Justice Brandeis said, in part, at page 493:

> "To prosecute men for such publications reminds me of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act * * * had in effect restored the crime of constructive treason."

The portion of the charge referred to is set out in a footnote, not here quoted in full, but concluding:

> "Congress could not call some mere words treason, because the Constitution prohibits it; but there is no constitutional limitation on the power of Congress to declare those things a crime which Congress has done in this act."
>
> *Wimmer v. United States,* 264 F. 11, cert. den. 253 U. S. 494.

In that case the indictment was under that provision of the Espionage Act of June 15, 1917, which read:

> "Whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished."

The defendant contended that the Act was unconstitutional because it punished treasonable conduct without proof of the overt act by two witnesses.

The Court sustained the conviction, saying in part:

> "A very similar contention was summarily overruled by the Supreme Court in *Frohwerk v. U. S.,* 249 U. S. 204, 210.
>
> " * * * Here the only conduct alleged or proved, as making out the offense, consists of oral statements—words only. It is well settled that one cannot, by mere words, be guilty of treason (38 Cyc. 954, and cases

cited), and thus the fallacy of Wimmer's contention becomes apparent * * *

"* * * Hence it may well be said that adherence by words only is an offense quite distinct from treason."

In the *Frohwerk* case, to which the Court in the *Wimmer* case referred, Mr. Justice Holmes disposed of a like contention by saying:

"These suggestions seem to us to need no more than to be stated."

United States v. Herberger, 272 F. 278.

This was a naturalization case in which the Court quoted with approval from the Charge to the Grand Jury, 30 F. Cas. 1936, No. 18272:

"Mere expressions of opinion indicative of sympathy with the public enemy * * * are not sufficient under the Constitution and laws to warrant a conviction of treason."

See also:

Chafee: *Free Speech in the United States,* pp. 259-260:

"Chief Justice Marshall said long ago that treason should not be extended by construction to doubtful cases, and there has never been a decision that talking against a war is treason. If it were, Vallandigham, Milligan, and the other Copperheads would surely have been prosecuted for this crime * * *

"* * * But if words are used in a speech demanding immediate peace, this is not assistance by acts at all, and furnishes the enemy with nothing but emotions of dubious value. Judges have frequently declared that expressions of opinion are not treason."

The question in this case is not whether Congress may make words in opposition to a war an offense. Congress did so in the Espionage Act of 1918, since repealed. The question is whether utterances and acts in preparation for them, not conveying information to the enemy, but expressing only sentiments sincerely believed to be in the interests

of the United States, constitute treason. All prior decisions, as we understand them, were that they did not.

We respectfully submit that the matters raised by the petition for certiorari require the consideration and determination of this Court, and, therefore, urge that this petition for a rehearing be granted and that the judgment of the District Court of the United States for the District of Massachusetts be, upon further consideration, reversed.

Respectfully submitted,

EDWARD C. PARK,
Counsel for Douglas Chandler.

CERTIFICATE OF COUNSEL.

I, EDWARD C. PARK, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of the cause is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

EDWARD C. PARK.

CERTIORARI DENIED